Filed 12/2/16 Lund v. Gifford CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WILLIAM S. LUND, Plaintiff and Appellant, v. L. ANDREW GIFFORD, Defendant and Respondent.	B259366 (Los Angeles County Super. Ct. No. BC529960)

APPEAL from orders of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Affirmed.

Bohm Wildish, James G. Bohm and Matthew Troncali, for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Brian M. Daucher and Adrienne W. Lee, for Defendant and Respondent.

Plaintiff and appellant William S. Lund sued defendant and respondent L. Andrew Gifford for slander. Lund appeals from the trial court's order granting Gifford's special motion to strike the complaint pursuant to Code of Civil Procedure section 425.16 (anti-SLAPP motion).[1] He contends that the trial court erred by (1) granting the anti-SLAPP motion; (2) denying his ex parte application for an order shortening time on a discovery motion; and (3) awarding attorney fees in an unreasonable amount. Discerning no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Lund and his former spouse, the late Sharon Disney Lund, were married in 1969 and divorced in 1977. They had three children: Victoria Lund[2] and twins Bradford (Brad) and Michelle Lund. Sharon, who was Walt Disney's daughter, died in 1993. During her lifetime Sharon established trusts for the benefit of each of the three children. Victoria died without issue in 2002, and the remainder of her trust was added to the residuary trusts for Brad and Michelle (the "Brad Trust" and the "Michelle Trust"). Lund is currently married to Sherry Lund.[3]

---

1 All further undesignated statutory references are to the Code of Civil Procedure.

SLAPP is the acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

2 Victoria was Sharon's daughter from a previous marriage. After Sharon's first husband died, she married Lund. Lund adopted Victoria.

3 We refer to appellant and respondent by their last names. To avoid confusion, and with no disrespect, we refer to other

Since their inception, the trusts have had three individual trustees and one corporate trustee. As of 2009, Lund, along with Gifford, Robert L. Wilson, and First Republic Trust Company, were cotrustees of the Brad and Michelle Trusts. The trusts provide that the heirs will receive distributions on specified birthdays.

1. *The petition to remove Lund as trustee*

In September 2009, Michelle suffered a ruptured brain aneurysm, from which she eventually recovered. This unfortunate event precipitated a barrage of litigation involving the trusts, conservatorship proceedings, and other matters. As relevant here, shortly after Michelle suffered the aneurysm, cotrustees Gifford, Wilson, and First Republic allegedly learned through a real estate business partner of the trusts, Conley Wolfswinkel, that Lund had earned over $3.5 million on Arizona real estate deals related to the trusts' investments. In the view of the trustees, Lund had inappropriately earned these "secret personal profits," which amounted to a "kickback akin to a 'finder's fee.' " Consequently, on October 20, 2009, Gifford, Wilson, and First Republic petitioned in Los Angeles County Superior Court to remove Lund as a trustee due to his alleged breach of fiduciary duty.

On November 25, 2009, Lund filed a petition to remove Gifford, Wilson, and First Republic as cotrustees. He alleged, inter alia, that the petition to remove him was meritless; Brad and Michelle had consented to the payments to him; and the other trustees had not acted prudently, in that they failed to

---

members of the Lund family by their first names. In keeping with the parties' usage, we refer to Bradford as Brad.

investigate the Wolfswinkel allegations and burdened the trusts with legal fees. Brad filed a parallel petition to remove the three cotrustees.

The parties agreed to settle the dispute and executed a settlement agreement on September 14, 2010. Pursuant to the agreement's terms, Lund agreed to resign as trustee of the Brad and Michelle Trusts; Brad's trust would pay Lund $500,000 per year for the rest of Lund's life, at Brad's request, "as extraordinary fees for past services"; all fees and costs incurred in the litigation by Gifford, Wilson, and First Republic would be paid equally by the Brad and Michelle Trusts; and all fees and costs incurred in the litigation by Lund and Brad would be paid by the Brad Trust. The agreement stated, "This Settlement shall not constitute an admission of wrongdoing by any party hereto and each party denies categorically any allegation of wrongdoing against him or it." The agreement also expressly stated it was "subject to approval by the Court hearing the Litigation."

2. *The Arizona Republic interview*

In late September 2010, Robert Anglen, a reporter for the Arizona Republic newspaper, contacted the cotrustees and informed them he was working on a story related to the Lund family, including the trust litigation. Gifford had not previously met or known of Anglen. On October 1, 2010, Gifford and Wilson participated in a telephonic interview with Anglen, which was recorded and transcribed. An attorney for the cotrustees, Peter Gelblum, and a public relations professional, Steven Sugarman, were present in person or telephonically. Anglen explained: "I was approached about the case by the Lund family. They've made a series of allegations, particularly in relation to the . . . Arizona case, but also about the Orange County probate

case." It is undisputed that Gifford made the allegedly slanderous statement during the interview. Early in the call, the following exchange transpired:

"[ANGLEN]: [A] lot of the questions I have are about the allegations made about both you, Bob [Wilson], and you, Andy [Gifford], in regard to [the California and Arizona] cases. So I'll start off by asking, why do you want to destroy the Lunds?

"A VOICE: I'm sorry?

"[ANGLEN]: Some of these are . . . going to sound pedantic. I'm only doing that to introduce sort of the theme of this, but that really is what they're saying, that you're manipulating--frankly, they're accusing you of manipulating both cases, even though you may not be involved in all of them, and using their children against them to force him out of the trust, to force Bill Lund out of the trust, and that this has all been orchestrated by . . . you two.

"[GIFFORD]: Well, I guess I – This is Andy.

"[ANGLEN]: Uh-huh.

"[GIFFORD]: And I would start by saying that we have – at least I have no desire to destroy the Lund family. And, two, that Bill was forced out of the trust by virtue of his own misconduct."

On October 8, 2010, the Arizona Republic published an article by Anglen entitled, "In the Valley, Heirs Embroiled in Disney Feud." The article introduced the Disney legal battles, reviewed Lund's personal history, summarized his $3.5 million profit on the trusts' real estate transactions, and then included the following quotation, drawn from the October 1 interview: " 'I have no desire to destroy the Lund family,' said Andy Gifford,

co-trustee and attorney. 'Bill was forced out of the trust by his own misconduct.' "

3. *The slander complaint*

On November 12, 2010, the trial court approved the settlement.

Thereafter, on December 9, 2013, Lund sued Gifford for slander based on the 2010 statement to Anglen. Lund also filed two related cases: a slander action against cotrustee Wilson arising from the same Arizona Republic statement; and a libel action against Mitchell Silberberg & Knupp and attorney Gelblum, based on Gelblum's statement on his law firm website biography that he had succeeded in having an unnamed Disney family trustee removed for earning a secret profit from trust transactions. Anti-SLAPP motions in all three cases were heard by the same judge at the same time.[4]

4. *The Lunds' blog*

Lund and Sherry created an online "blog" that commented on the ongoing feud among the family members, trustees, and other persons. The blog stated that Lund had been "the only Trustee who ha[d] truly taken care of Brad and Michelle's interests" and "did not just sit there and collect a fee." Continuing, the blog averred: "it is hard for us to grasp the reality and immeasurable evilness of what Bob Wilson, Andy Gifford," and others were "trying to do to our family." The blog further stated Gifford and Wilson were attempting to control Brad and Michelle's trusts and personal estates; Lund had never taken a " 'kickback' " for land deals related to the trusts;

---

[4] The rulings on the other two anti-SLAPP motions are not before us.

Gifford's and Wilson's allegations were "completely false and they kn[e]w it"; and the beneficiaries had signed documents approving Lund's remuneration on the land deals. The blog threatened that "We will be filing lawsuits against everyone involved in this conspiracy. We will be suing and asking for damages, perjury, defamation of character, slander, malicious prosecution, frivolous charges and everything we can."

5. *The Daily Mail Online article*

In November 2013, the Daily Mail Online published a piece entitled: "Not so magic kingdom: Twin grandchildren of Walt Disney battle it out over disputed $400 million inheritance." The article summarized the family's disputes. It related statements by Lund, including that the trustees were behaving unlawfully, and "Walt . . . [would] be appalled" at the "way the trustees have acted." The article also included verbatim the Gifford quote from the 2010 Arizona Republic article.

6. *The anti-SLAPP motion*

Gifford responded to Lund's complaint with an anti-SLAPP motion. He contended the slander cause of action arose from protected activity in that his statement concerned a matter that was the subject of a pending judicial proceeding and was a public statement about an issue of public concern made in a public forum. Lund could not demonstrate a probability of prevailing because the claim was time-barred, the statement was not actionable opinion, and the statement was true. The motion was supported with, inter alia, Gifford's declaration; excerpts from Lund and Sherry's blog; a transcript of the Anglen interview; copies of the 2010 Arizona Republic and 2013 Daily Mail Online articles; and various pleadings and court documents in the instant matter and related cases. Also offered in support were

excerpts of Michelle's testimony in another trust-related proceeding, in which she (1) denied signing a letter consenting to Lund's receipt of the $3.5 million, and (2) stated that on the date Brad purportedly signed the same letter, he was in Hawaii, on vacation, with her. In excerpts from Lund's deposition testimony in another case, Lund admitted that prior to the commencement of litigation, he did not inform the cotrustees orally or in writing, or at a trustee meeting, that he was receiving the $3.5 million, and the cotrustees had not formally approved his receipt of the money.

Lund unsuccessfully moved to continue the anti-SLAPP motion and for discovery.[5] He opposed the anti-SLAPP motion on the grounds that Gifford's statement was not protected speech; it did not pertain to a matter under judicial consideration because the parties had already settled; and it did not pertain to an issue of public interest because neither he nor the Disney grandchildren were in the public eye and private trust litigation was not a matter of public interest. Further, the statement fell within the statutory exemption for commercial speech. Lund averred he would prevail on the merits because Gifford's statement contained false and actionable statements of fact. Lund never took a "secret profit" from the trusts; instead he was paid by virtue of a separate agreement he had with a development company, for his work in obtaining "property entitlements"; Gifford and Wilson knew of this agreement, and the children had consented to it. The settlement was favorable to him and he was the prevailing party; he resigned due to health

---

5 We discuss these motions in more detail where relevant *post*.

concerns related to stress. The cause of action was not time-barred because republication was foreseeable and the 2013 Daily Mail Online article reset the statute of limitations. In support of his opposition, Lund offered his declaration; a copy of the settlement agreement; copies of the Arizona Republic and Daily Mail Online articles; and excerpts from Gifford's trial testimony in another trust-related proceeding, in which Gifford explained the purpose of the 2010 interview was to avoid false, adverse publicity that might impede the trusts' ability to sell the trusts' Arizona real estate.

Both parties filed objections; the court sustained some and overruled others.

The trial court granted the motion. It concluded Gifford's alleged statement was protected as a statement made in connection with a matter under judicial review (§ 425.16, subd. (e)(2)) and also qualified as a statement related to a matter of public interest (§ 425.16, subd. (e)(3)). The commercial speech exemption (§ 425.17, subd. (c)) was inapplicable. Lund could not establish a probability he would prevail on the merits because his complaint was barred by the statute of limitations (§ 340, subd. (c)).[6] The court subsequently granted Gifford's motion for attorney fees pursuant to section 425.16.

Lund filed a timely notice of appeal. (§ 425.16, subd. (i).)

---

[6] The trial court did not reach Gifford's arguments that Lund could not prevail because the alleged slander amounted to nonactionable opinion on the merits of pending litigation, or that the alleged statement was true.

DISCUSSION

1. *Applicable legal principles and standard of review*

Section 425.16 provides an expedited procedure for the early dismissal of unmeritorious lawsuits brought to chill or inhibit the valid exercise of a party's constitutionally protected rights of petition or free speech. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 (*Simpson*); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at pp. 58-59.) It provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) The Legislature has declared that the statute must be broadly construed. (*Simpson, supra,* at p. 21; *Albanese v. Menounos* (2013) 218 Cal.App.4th 923, 928.)

A special motion to strike a complaint under section 425.16 involves a two-step process. First, the moving party has the initial burden of making a threshold showing that the challenged cause of action arises from a protected activity. (*Simpson, supra,* 49 Cal.4th at p. 21; *Albanese v. Menounos, supra,* 218 Cal.App.4th at p. 928.) To meet this burden, the party must show the act underlying the cause of action fits one of the categories described in section 425.16, subdivision (e). (*Albanese,* at p. 928; *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1160; *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 940.) "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action

must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

Once the moving party has made the threshold showing, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; *Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 308 (*Demetriades*).) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten,* at p. 89.)

Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are legal questions that we review independently on appeal. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820; *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 961.) We consider the "pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); *Navellier v. Sletten, supra,* 29 Cal.4th at p. 89; *Demetriades, supra,* 228 Cal.App.4th at p. 308.) We do not weigh credibility or compare the weight of the evidence. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385.)

2. *Gifford met his burden to show Lund's slander cause of action arose from protected activity*

a. *Gifford's statement was made in connection with an issue under consideration or review by a judicial body within the meaning of section 425.16, subdivision (e)(2)*

Section 425.16, subdivision (e) sets forth four categories of conduct that qualify as acts in furtherance of a person's right of speech or petition and are subject to a special motion to strike: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

Here, the trial court found the allegedly slanderous statement fell within the second and third categories of section 425.16, subdivisions (e)(2) and (e)(3). We agree that the statement falls within subdivision (e)(2), in that it was made in connection with an issue under consideration by a judicial body. Therefore we need not, and do not, reach the question of whether the statement was made in a public forum in connection with an issue of public interest.

As noted, section 425.16, subdivision (e)(2) protects any written or oral statement or writing made in connection with an

issue under consideration or review by a legislative, executive, or judicial body. "This includes statements or writings made in connection with litigation in the civil courts." (*Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5.) "Thus, an action for defamation falls within the anti-SLAPP statute if the allegedly defamatory statement was made in connection with litigation." (*Ibid.*) A statement or writing that falls within the ambit of section 425.16, subdivision (e)(2) is protected whether or not it involves a public issue. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123; *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 863-864.)

To be considered "in connection" with an issue under consideration or review, the statement or writing must be (1) made while the issue is actually under consideration by the legislative, executive, or judicial body, and (2) must be connected to an issue under review in the proceeding, not merely the proceeding itself. (See *Paul v. Friedman, supra,* 95 Cal.App.4th at p. 867; *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, 177; *Annette F. v. Sharon S., supra,* 119 Cal.App.4th at pp. 1160-1161; *People ex rel 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 285; *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 113-114.) For purposes of section 425.16, subdivision (e)(2), a matter is under review if it is subject to inspection or examination. (*Maranatha Corrections, LLC v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1075, 1085; *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1049.) Section 425.16 "does not accord anti-SLAPP protection to suits arising from any act having any connection, however

remote, with an official proceeding." (*Paul v. Friedman,* at p. 866.) Instead, the statements must have some connection with an *issue* under consideration in the proceeding. (See *id.* at pp. 866-867.)

Annette F. v. Sharon S. is instructive. There, Annette and Sharon, a lesbian couple, were prominent advocates for second-parent adoption. Annette formally adopted Sharon's first son and, when Sharon gave birth to a second son, the couple signed an agreement providing for Annette to adopt him as well. Before the adoption transpired, the women separated and their relationship became acrimonious. Approximately a month later, Annette filed a motion to adopt the second son. Sharon moved to withdraw her consent, contending there was no legal basis for a second-parent adoption and her consent had been obtained by fraud or duress. (*Annette F. v. Sharon S.*, *supra,* 119 Cal.App.4th at pp. 1154-1156.) The trial court denied Sharon's motion to dismiss the adoption petition and she filed a petition for writ of mandate. In a controversial decision, the appellate court reversed, holding there was no statutory basis for a second-parent adoption. (*Id.* at pp. 1156-1157.) Many in the gay and lesbian community criticized Sharon for having challenged the validity of second-parent adoptions. (*Id.* at p. 1157.) After the appellate opinion was issued but before it was final, Sharon sent a letter to the Gay and Lesbian Times of San Diego, in which she questioned whether further contact between the children and Annette was wise, given that Annette had allegedly made false accusations of child abuse and neglect and had been convicted of perpetrating domestic violence against Sharon. The newspaper published Sharon's letter. (*Id.* at p. 1158.) Annette sued Sharon for libel, and Sharon brought an anti-SLAPP motion. (*Ibid.*)

As relevant here, *Annette F.* found Sharon's statements were made in connection with an issue under consideration or review by a judicial body. (*Annette F. v. Sharon S., supra,* 119 Cal.App.4th at pp. 1160-1161.) The court reasoned that when Sharon sent the letter, Annette's adoption petition was pending in the superior court and the writ proceeding was pending in the appellate court. (*Id.* at p. 1161.) Sharon's "allegations of domestic violence against Annette were directly at issue in the underlying adoption proceedings because Sharon claimed that her consent to [the second] adoption had been obtained by fraud or undue influence arising from Annette's acts of domestic violence against her. Annette's allegations of abuse and neglect were also relevant to the parties' competing claims as to [the second son's] best interests." (*Ibid.*) Therefore, Sharon's statements fell within section 425.16, subdivision (e)(2)'s ambit. (*Annette F.*, at p. 1161.)

The same is true here. Lund's slander action is premised entirely upon, and therefore arises from, Gifford's statement to reporter Anglen. (See *City of Cotati v. Cashman, supra,* 29 Cal.4th at p. 78.) The petition to remove Lund as trustee was filed on October 20, 2009. It alleged that Lund breached his fiduciary duties to the trusts by secretly requesting and receiving over $3.5 million in "kickbacks" for his role in encouraging the trusts to engage in certain Arizona real estate transactions. The parties executed a settlement agreement on September 14, 2010. Gifford made the allegedly slanderous statement to reporter Anglen on October 1, 2010, and Anglen's article was published in the Arizona Republic on October 8, 2010. The trial court approved the settlement on November 12, 2010. Thus, when Gifford spoke to Anglen and the story was published, the petition

seeking to remove Lund as a trustee was pending in Los Angeles County Superior Court. Whether Lund had committed misconduct and was to be removed as a trustee as a result was a key issue for the court's consideration in ruling on the petition. Gifford's statement was therefore directly connected to a substantive issue in the underlying litigation. Consequently, Lund's cause of action arises from protected activity within the meaning of section 425.16, subdivision (e)(2). (*Annette F. v. Sharon S., supra,* 119 Cal.App.4th at p. 1161; see also *Braun v. Chronicle Publishing Co., supra,* 52 Cal.App.4th at pp. 1048-1049; *Maranatha Corrections, LLC v. Department of Corrections & Rehabilitation, supra,* 158 Cal.App.4th at p. 1085.)

Lund contends that section 425.16, subdivision (e)(2) does not apply because when Gifford made the statement, the parties had settled and he had already agreed to resign as trustee. Therefore, he argues, whether he had committed misconduct and was being forced to resign was not an issue under consideration by the court. (See *Du Charme v. International Brotherhood of Electrical Workers, supra,* 110 Cal.App.4th at pp. 113-114 [statement on union's website that assistant business manager had been removed from office for financial mismanagement was not made in connection with an issue under review when the manager had already been terminated and the statement was made "after the fact"].) But when Gifford spoke to the reporter, the petition was still pending before the court; it had not been dismissed or withdrawn. As the trial court reasoned when ruling on the anti-SLAPP motion, there was no showing that the court hearing the petition was aware of the settlement when Gifford made the statement. Moreover, even if the court had been aware of the settlement, it could have refused to approve it. Even if the

court was no longer tasked with resolving the question of whether Lund should be removed, the question of whether he had committed misconduct was likely still relevant to its approval of the settlement agreement. Given the legislative mandate to construe section 425.16 broadly (§ 425.16, subd. (a)), we do not believe the fact a settlement had been reached, but not approved by the court, removed the statement from the protection of section 425.16, subdivision (e)(2).

b. *Section 425.17, subdivision (c)'s commercial speech exemption does not apply*

Lund contends that the anti-SLAPP statute does not protect Gifford's statement because it falls within the exemption for commercial speech contained in section 425.17, subdivision (c). We disagree.

Concerned about the " 'disturbing abuse' " of the anti-SLAPP statute, in 2003 the Legislature enacted section 425.17 to exempt certain actions from it.[7] (*Simpson, supra,* 49 Cal.4th at

---

[7] Section 425.17, subdivision (c) provides in pertinent part: "Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist: [¶] (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services. [¶] (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat

pp. 21-22; § 425.17, subd. (a).) Subdivision (c) of section 425.17 contains an exemption for commercial speech. As explained by our Supreme Court, the exemption applies when: "(1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17(c)(2)." (*Simpson,* at p. 30; *Demetriades*, *supra*, 228 Cal.App.4th at p. 308.)

The burden of proof as to the applicability of section 425.17's commercial speech exemption falls on the party seeking the benefit of it, in this case, Lund. (*Simpson, supra,* 49 Cal.4th at p. 26.) As a statutory exception to section 425.16, section 425.17 must be narrowly construed. (*Simpson,* at p. 22; *JAMS, Inc. v. Superior Court* (2016) 1 Cal.App.5th 984, 992.) "Under the two-pronged test of section 425.16, whether a section 425.17 exemption applies is a first prong determination." (*Demetriades, supra,* 228 Cal.App.4th at p. 308.) We do not consider whether the plaintiff is likely to prevail on the merits. (*JAMS, Inc. v. Superior Court,* at p. 993.) We independently review the

---

the statement to, or otherwise influence, an actual or potential buyer or customer . . . ."

applicability of the commercial speech exemption. (*Simpson,* at p. 26.)

Lund argues that "being a trustee is a profession in itself," in that trustees are compensated with trustees' fees and owe independent duties to their clients. The dictionary definition of "competitor" is one who buys and sells services in the same market. Therefore, he urges, because both he and Gifford provide the "same services, to the same entities, in the same market," the section 425.17, subdivision (c) exemption applies.

Lund has failed to meet his burden to show the commercial speech exemption applies here. First, there is no showing Gifford is a person "*primarily* engaged in the business of selling or leasing goods or services." (§ 425.17, subd. (c), italics added.) Lund's evidence on this point is limited to Gifford's trial testimony, in another case involving the Brad and Michelle Trusts, that in approximately 2002 Gifford was employed by U.S. Trust and became the trust representative for the subject trusts. Assuming arguendo serving as a trustee constitutes "the business of selling . . . services," Lund's evidence does not demonstrate this was Gifford's "primary" occupation at the time the statement was made. There is no evidence Gifford holds himself out to the general public as a trustee for hire. Lund has not shown Gifford serves as a trustee for any other client, or that he sought to do so. Lund's evidence shows only that Gifford was a long-term trustee on the subject trusts. (See *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.* (2010) 183 Cal.App.4th 1186, 1214 [section 425.17, subdivision (c) inapplicable where defendant was not a person primarily engaged in the business of selling or leasing goods or services].)

Lund has also failed to show Gifford's allegedly slanderous statement can be characterized as a representation of fact about Gifford's or a business competitor's services. (See *Simpson, supra,* 49 Cal.4th at p. 32 [commercial speech exemption applies only to a cause of action arising from " 'representations of fact about that person's [the defendant's] or a business competitor's business operations, goods, or services' "].) Gifford's statement that Lund was forced out of the trust by his own misconduct does not make any representation of fact about *Gifford*'s trustee services, and Lund has not established that he and Gifford are "competitors." To support his argument, Lund offered his own declaration stating that at the relevant time he served as a trustee for charitable foundations and other trusts unrelated to the Brad and Michelle Trusts; additionally, he provided "real estate development services." He averred he had been "involved in" "multimillion dollar development projects from Newport Beach, California, to Arizona to Wyoming, to Florida to Sardinia where I consulted with the Aga Kahn." Even if these statements sufficiently demonstrate *Lund* is a professional trustee and real estate developer, there is no showing he is a competitor of *Gifford's*. As noted, Lund made no showing Gifford provides trustee or real estate services for entities other than the Brad and Michelle Trusts, or seeks such employment, or provides trustee or real estate services in Newport Beach, Wyoming, Arizona, Florida, or Sardinia. Lund's evidence shows only that Gifford was a long-term trustee on the subject trusts. Lund and Gifford were cotrustees, not competitors, in regard to them.

Finally, Lund has failed to show the "intended audience" for Gifford's statement was an actual or potential buyer, customer, or person likely to repeat the statement to, or

influence, buyers or customers. (§ 425.17, subd. (c)(2).) Gifford's statement was made to a reporter for the Arizona Republic newspaper, whom Gifford knew was writing an article about the Disney family litigation and the trusts. As we have seen, there is no evidence Gifford was actively marketing his services as a trustee in Arizona or elsewhere. The statement itself does not remotely suggest Gifford intended to reach an audience of potential clients; it did not tout Gifford's services nor did it attempt, explicitly or implicitly, to solicit business for Gifford. The statement was published in a news article, not an advertisement. The newspaper was not a specialized publication targeting persons likely to need trust or real estate services. That some members of the Arizona Republic's general readership might happen to need the services of a trustee or a real estate professional does not suffice to establish the requirements of section 425.17, subdivision (c)(2).

Lund argues the "intended audience" requirement was met because Gifford "acknowledge[d]," both in his declaration and in testimony given in a different matter related to the Brad and Michelle Trusts, that the allegedly slanderous statement was intended to "influence actual or potential buyers or customers of the trust's real estate business," such as "brokers, buyers, and city officials." To the contrary, Gifford's explanations, which we set forth in the margin,[8] indicated he hoped to dispel the "false

---

[8] Gifford's declaration in support of the anti-SLAPP motion stated: "Because Mr. Anglen had apparently already talked to William and/or Sherry Lund, and was raising questions about our motives in the pending litigation with William Lund, we felt we needed to respond to his request for an interview. In addition, the Trusts owned tens of millions of dollars of real estate in

impression" that the trustees were unscrupulous and were "taking advantage of the Disney grandchildren," adverse publicity that could have impeded the *trusts'* ability to sell *trust* real estate in Arizona. In other words, Gifford's statement was made to ensure the trusts would not be hindered in their efforts to sell trust property. There is no evidence Gifford made the allegedly slanderous statement in order to promote sales of his *own* trustee or real estate services, or of his own property, to an

---

Arizona which the Trusts were marketing for sale. We, the trustees, were concerned that adverse publicity based upon misstatements of facts could harm the Trusts' efforts to sell its real estate by damaging the trustees' and the Trusts' reputation among brokers, potential buyers, and public officials with whom the trustees would need to work to accomplish sales of the Trusts' real estate in Arizona."

In his trial testimony, Gifford explained: "So the concern was that – the trust had at that time somewhere north of [$]65, maybe even $75 million, worth of real estate in Arizona that was on the market. We had to deal with other brokers, buyers, city officials. And the concern was that if misinformation or false information was distributed through the newspaper that tarnished the reputation of the trustees, that that would impede our ability to deal with people, because they would have the false impression that we were taking advantage of the Disney grandchildren and that we were unscrupulous. [¶] So the reason that we hired Mr. Sugarman [the public relations professional] was, first, to see if we could persuade them not to have any story about the trust at all, where the trust wouldn't be mentioned at all. When that wasn't possible, then we wanted to make certain that it was a factual story, and so we wanted to produce the facts that we had and let the – if the story was going to come out, have it at least be a balanced story . . . ."

audience of potential customers. Thus, even assuming for the purposes of argument that Gifford's statement was made "in the course of" his delivery of his trustee services, and consequently that Lund need not show the statement was made for the purpose of promoting Gifford's services,[9] Lund has failed to establish that the exemption applies.

Neither *Simpson* nor *Demetriades*, cited by Lund, assist him. In *Simpson,* Simpson Strong-Tie Company, a screw manufacturer, sued an attorney and his law firm after the law firm placed a newspaper advertisement informing readers that they might be entitled to monetary compensation if their decks were built with screws manufactured by Simpson, and inviting

---

[9] Lund argues that section 425.17, subdivision (c)(2) applies when a statement was either made for one of the purposes listed in subdivision (c)(1) (i.e., promoting or securing sales), *or* was made in the course of delivering the defendant's goods or services. (*Simpson, supra,* 49 Cal.4th at p. 30.) He argues that here, the allegedly slanderous statement was made "in the course of delivering" Gifford's trustee services, because (1) the trusts hired a public relations professional to assist with the interview, (2) the trusts' attorney met with the reporter, and (3) Gifford stated in his declaration and testimony in another trial (set forth in footnote 8, *ante*), that the trustees agreed to the interview to minimize adverse publicity that might have hindered efforts to sell the trusts' Arizona real estate assets. But even if the statement was made in the course of delivering services to the trust, Lund's argument nonetheless fails because he has not shown all the requirements of section 425.17 have been met. "A special motion to strike may be denied pursuant to section 425.17, subdivision (c) only when both paragraphs (1) and (2) apply." (*Sunset Millennium Associates, LLC v. LHO Grafton Hotel, L.P.* (2006) 146 Cal.App.4th 300, 312.)

readers to contact the attorney for an investigation. (*Simpson, supra,* 49 Cal.4th at p. 16.) The Supreme Court held section 425.17, subdivision (c)'s commercial speech exemption did not apply. (*Simpson*, at p. 17.) The attorney was not a competitor of Simpson's, and therefore the implication that the screws were defective was not a statement about either the attorney's goods or services or those of the attorney's competitor. (*Id.* at pp. 30-32.) *Simpson* thus supports, rather than undercuts, the conclusion that the commercial speech exemption is inapplicable here.

In *Demetriades,* a restaurant operator sought an injunction under the unfair competition and false advertising laws to prevent Yelp, an online website featuring restaurant reviews, from making claims about the accuracy of its filtering program. *Demetriades* held section 425.17's commercial speech exemption applied because Yelp's statements about its review filter were statements of fact about the quality of Yelp's product, intended to reach third parties and induce them to patronize Yelp's Web site. (*Demetriades*, *supra*, 228 Cal.App.4th at pp. 298, 310-311.) Among other things, *Demetriades* observed that section 425.17 is "aimed squarely at false advertising claims." (*Demetriades*, at p. 309.) The facts here bear no resemblance to those in *Demetriades*, and do not support a conclusion that Gifford's statement is commercial speech.

3. *Lund has not established a probability of prevailing*

Because Gifford established the slander cause of action arose from protected activity, the burden shifted to Lund to establish a reasonable probability he would prevail on the merits. To establish the requisite probability of prevailing, the plaintiff must demonstrate that the complaint is legally sufficient and is

supported by a prima facie showing of facts that, if proved at trial, would support a judgment in his favor. (*Navellier v. Sletten, supra,* 29 Cal.4th at pp. 88-89; *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1166.) The plaintiff must make this showing by means of competent, admissible evidence. (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444.) The court cannot weigh the evidence, but must determine as a matter of law whether it is sufficient to support a judgment in the plaintiff's favor. (*Oasis West Realty, LLC v. Goldman, supra,* 51 Cal.4th at p. 820.) The plaintiff need only establish his claim has minimal merit to avoid being struck as a SLAPP. (*Soukup v. Law Offices of Herbert Hafif, supra,* 39 Cal.4th at p. 291; *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1543.) The defendant can defeat the plaintiff's evidentiary showing by presenting evidence establishing the plaintiff cannot prevail as a matter of law. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, abrogated by statute on other grounds as stated in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 545-550; *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 866.)

Gifford argues Lund cannot prevail because his complaint is time-barred. We agree. The statute of limitations operates as an affirmative defense, and therefore Gifford has the burden of proof on the issue. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 [statute of limitations is an affirmative defense]; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676 [a defendant bringing an anti-SLAPP motion has the burden of proof on establishing an affirmative defense]; *Seltzer v. Barnes, supra,* 182 Cal.App.4th at p. 969.) The statute of limitations for

slander is one year. (§ 340, subd. (c); *Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1246.) Gifford's declaration states he made the allegedly slanderous statement to reporter Anglen on October 1, 2010. Anglen's article containing the statement at issue was published on October 8, 2010. It is thus undisputed that Gifford made the allegedly slanderous statement in early October 2010. Lund's complaint for slander was filed on December 9, 2013, over three years later. Thus, on its face, Lund's cause of action is time-barred. Gifford argues Lund therefore cannot show a probability of prevailing on his claim. (See *Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398-399 (*Traditional Cat*); *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 821.)

Lund counters that the cause of action is not time-barred because Gifford's statement was republished verbatim in November 2013 in the "Not so magic kingdom" article by reporter Joshua Gardner. Although the 2013 republication is not referenced in Lund's complaint,[10] he argues that because it was

---

[10] Lund's complaint is based entirely on the October 2010 statement; it does not reference the 2013 Daily Mail Online article. However, in opposition to the anti-SLAPP motion Gifford and Lund presented evidence of the Daily Mail Online article and Lund argued that its publication reset the statute of limitations. Lund argues that omission of the 2013 article in his complaint is immaterial because the trial court could properly have granted him leave to amend to include it. In support, he relies on *Ngyuen-Lam v. Cao, supra,* 171 Cal.App.4th 858. There, the plaintiff's complaint was facially deficient because it failed to allege actual malice. (*Id.* at pp. 865-866.) However, defendant's declaration offered in opposition to the anti-SLAPP motion provided evidence of actual malice. (*Ibid.*) In light of this evidence, the trial court concluded the plaintiff had established a

reasonably foreseeable the statement would be republished, the 2013 Daily Mail article restarted the limitations period.

Exercising our independent review, we agree that the claim is time-barred. "Slander is a species of defamation." (*Nguyen-Lam v. Cao, supra,* 171 Cal.App.4th at p. 867.) The tort of defamation constitutes an injury to reputation, which may occur by means of libel or slander (false and unprivileged written or oral communications, respectively). (*Shively v. Bozanich, supra,* 31 Cal.4th at p. 1242; *Nguyen-Lam*, at p. 867.) As relevant here, Civil Code section 46 specifies that slander includes a false statement that "[t]ends directly to injure [the plaintiff] in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or

---

probability of prevailing, granted the anti-SLAPP motion, and authorized the plaintiff to amend her complaint accordingly. (*Id.* at pp. 865-866.) The appellate court affirmed. Section 425.16 is silent on the issue of amendment, but provides for limited discovery upon a good cause showing. Accordingly, " ' nothing in the statute or case law suggests that the factual analysis for ruling on the motion must be frozen in time on the date the complaint is filed.' [Citation.]" (*Ngyuen-Lam*, at p. 871.) Although a plaintiff may not avoid or frustrate a hearing on the anti-SLAPP motion by filing an amended complaint, where the evidence prompting the amendment is contained in declarations already submitted for the anti-SLAPP] hearing, "there is no risk the purpose of the strike procedure will be thwarted with delay, distraction, or increased costs." (*Id.* at p. 872.) Lund relies on these principles to argue that, if the republication of the statement defeats the statute of limitations defense, amendment would be proper. In light of our conclusion that the anti-SLAPP motion was properly granted, we express no opinion on the question.

other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits."

An element of defamation is publication. "In California the accrual of causes of action growing out of the publication of defamatory or other tortious statements is governed by the single-publication rule," codified in Civil Code section 3425.3.[11] (*Traditional Cat, supra,* 118 Cal.App.4th at p. 395; *Shively v. Bozanich, supra,* 31 Cal.4th at p. 1246.) "Under the rule, one cause of action will arise, and the statute of limitations will commence running, upon the first general publication or broadcast of a tortious statement, notwithstanding how many copies of the publication are distributed or how many people hear or see the broadcast. Any subsequent republication or rebroadcast gives rise to a new single cause of action." (*Traditional Cat*, at p. 395; *Shively v. Bozanich*, at p. 1245.)

However, the "repetition by a new party of *another person's earlier* defamatory remark . . . gives rise to a separate cause of action for defamation against the *original defamer*, when the repetition was reasonably foreseeable," authorized, or intended. (*Shively v. Bozanich, supra,* 31 Cal.4th at p. 1243, first italics

---

[11] Civil Code section 3425.3 provides: "No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions."

added; *Mitchell v. Superior Court* (1984) 37 Cal.3d 268, 281.) "It is the foreseeable subsequent *repetition* of the remark that constitutes publication and an actionable wrong in this situation, even though it is the original author of the remark who is being held accountable." (*Shively v. Bozanich*, at p. 1243.)

In *Schneider v. United Airlines, Inc.* (1989) 208 Cal.App.3d 71, United Airlines reported to a credit reporting agency, TRW, that it had "charged off" an amount owing on plaintiffs' account. TRW republished the information when it provided credit reports containing the information to two banks. (*Id.* at pp. 73-74.) Plaintiffs sued United over a year after the initial report to TRW, but less than a year after the second republication to one of the banks. *Schneider* held that the defamation causes of action accrued when TRW republished the allegedly defamatory statement by sending the second bank a copy of the credit report. (*Id.* at p. 74.) The court explained: "Clearly, when [the airline] gave TRW, a credit reporting agency, information pertinent to appellants' credit, they necessarily must have foreseen that said information would be distributed to others (republished) as that is the function of a credit reporting agency." (*Id.* at p. 75.) *Schneider* reasoned that the Uniform Single Publication Act, which encompasses Civil Code section 3425.3, did not apply because it did not cover " ' "separate aggregate publications on different occasions. . . . In these cases the publication reaches a new group and the repetition justifies a new cause of action." ' " (*Schneider*, at p. 76.)

In *Canatella v. Van de Kamp* (9th Cir. 2007) 486 F.3d 1128, the Ninth Circuit concluded no republication occurred. Canatella, a California attorney, was disciplined by the state bar. In 1999, the sanction and his suspension became part of his

public disciplinary record. In February 2000, the *California Bar Journal* published a summary of Canatella's disciplinary sanction in its paper and online editions. (*Id.* at p. 1130.) In 2003, after the state bar changed its website's search features, the disciplinary record as summarized in the journal (rather than just the existence of a disciplinary record) began to appear if a member of the public did a "member search" on attorneys, including Canatella. (*Id.* at p. 1131.) In 2004, an attorney representing a client adverse to Canatella cited the disciplinary summary that appeared on the member search page in support of a motion to recover court costs. Canatella responded with a civil rights suit against the State Bar of California, several of its officers, and the attorney. (*Ibid.*) Canatella attempted to avoid application of the single publication rule by arguing, inter alia, the adverse attorney's foreseeable citation of the disciplinary record constituted republication and restarted the limitations period. (*Id.* at pp. 1134-1135.) The Ninth Circuit disagreed. Distinguishing *Schneider,* the court explained: "whereas *Schneider* involved giving information to an agency *charged with republishing* that information in response to specific inquiries, Appellees merely posted the allegedly offensive statement on a public website. Therefore, unlike the defendants in *Schneider* who made an offensive statement to an agency that they knew would report the information to others, Appellees had no similar foresight that [the attorney] would communicate the information posted on the internet." (*Canatella*, at p. 1135.)

In his declaration in support of the anti-SLAPP motion, Gifford declared that he had never met, spoken to, or communicated with the author of the 2013 article, Gardner; had never given the quote to anyone other than Anglen; and was

unaware of any other publication of the quote. Lund offers no admissible evidence to the contrary.[12] There is therefore no dispute that Gifford did not authorize or intend any republication of his quote.

As to foreseeability, the facts here are entirely unlike those in *Schneider*. The function of a credit reporting agency is to disseminate credit information to other persons and entities for their use in making informed credit decisions. Such credit information is provided with the intent and understanding it will be published not just once, but will be stored and repeatedly republished in the future to merchants or banks who inquire about a subject's credit history. The function of a newspaper is quite different. In general, a newspaper reports on a daily or weekly basis on issues of current significance. Newspapers do not, as a matter of course, repeatedly run the same article. Gifford's statement was but a small portion of the 2010 article. It was responsive to specific allegations made to the reporter by Lund, his wife Sherry, or someone in the Lund family who was sympathetic to their position in the dispute. Lund argues Gifford made the statement to influence public opinion; his purpose was to disseminate information; and therefore republication was foreseeable. But the statement pertained to a discrete event, Lund's resignation from the trust. Once that matter settled, as it did in 2010, there was little reason to expect Gifford's quotation would be newsworthy, or that the trustees had any further intent

---

[12] Lund declared he had "reason to believe" that Gifford had spoken with other reporters since 2010. Gifford's objection to this evidence was properly sustained on hearsay and lack of foundation grounds. (See Evid. Code, §§ 1200, 402.)

to influence public opinion or disseminate that information again. Even assuming future news stories about the ongoing litigation between the Disney heirs and their family was foreseeable, it is a stretch to conclude that a future publication would pluck Lund's quote from among all the other information available and republish it. Indeed, that the quotation was ignored by the media for over three years suggests unforeseeability. If it was not foreseeable that the information at issue in *Canatella* – disciplinary information stored online, accessible to the public via a search function, and likely to be of interest to persons seeking an attorney – would be republished, it was not to be expected that Gifford's statement would be. (See generally *Mitchell v. Superior Court, supra,* 37 Cal.3d at p. 281.)

4. *The trial court did not abuse its discretion by denying Lund's ex parte motion shortening time to hear his motion for further discovery*

a. *Additional facts*

The anti-SLAPP motion was filed on February 7, 2014 and the original hearing date assigned was June 4, 2014. On May 20, 2014, Lund's original counsel substituted out and current counsel substituted in. On May 21, the date upon which Lund's opposition to the anti-SLAPP motion was due, Lund's new counsel brought an ex parte application to continue the hearing on the anti-SLAPP motion on the ground Lund had learned only the day before that the former attorney intended to withdraw and his new counsel needed time to prepare. Lund also applied for leave to conduct limited discovery, or, alternatively, for an order shortening time for him to brief and be heard on a motion for limited discovery. Lund averred he needed discovery "on defamation issues." He had reason to believe Gifford had

republished the statement when speaking to additional media outlets. If the court ultimately concluded Lund was a public figure as alleged by Gifford, Lund needed discovery on the issue of actual malice. The trial court granted the application and continued the hearing on the special motion to strike to July 8, 2014. According to notice given by Lund, the court did not rule on the issue of limited discovery but indicated it would consider a noticed motion on a shortened time basis.

On June 9, 2014, Lund's counsel propounded proposed discovery requests to Gifford via email.[13] On June 10, Gifford's counsel responded that the proposed discovery was overbroad. Counsel agreed to respond to interrogatories on the issue of when Gifford gave interviews in which the challenged statement was made, and whether any other interview transcripts existed. Counsel stated Gifford was unwilling to allow further delay, especially since Lund "decided to wait 3 weeks to begin this discussion." Lund's counsel responded that he would file a discovery motion. He declined Gifford's offer to respond to limited interrogatories.

On June 12, 2014, Lund filed a discovery motion along with an ex parte application for an order shortening time for the motion to be heard. The motion averred that good cause existed for discovery because Lund needed discovery on the issues of, inter alia, actual malice and republication; the application averred that an order shortening time was necessary so that the

---

[13] The proposed discovery was comprised of a set of four requests for admission; a set of 15 special interrogatories; a set of 10 requests for production of documents; and a notice of deposition for Gifford.

discovery motion could be heard before Lund's opposition to the anti-SLAPP motion was due on June 24. Gifford opposed the motion, arguing Lund had delayed bringing the motion for four months after being served with the anti-SLAPP motion and three weeks after the prior ex parte hearing; the requested discovery was overbroad; there was no showing of irreparable harm; and permitting the requested discovery would frustrate the purpose of the anti-SLAPP statute.

The trial court denied the ex parte application on June 12, 2014. The record does not reflect the basis for its ruling. At the subsequent hearing on the anti-SLAPP motion, Lund's counsel requested that the court hear his motion for discovery. The court declined to do so given that it had already granted the anti-SLAPP motion.

b. *Discussion*

Lund argues that the court abused its discretion by denying the ex parte application, thereby foreclosing his motion for limited discovery.[14] He insists discovery was necessary to allow him to develop evidence on the issues of malice, foreseeability, republication, and intent, and Gifford had sole control over such evidence. He requests that we remand the matter for limited discovery. Gifford argues there was no abuse of discretion because, inter alia, the application was untimely.

Pursuant to section 425.16, subdivision (g), all discovery proceedings in an action are stayed upon the filing of an anti-

---

14 Gifford points out that Lund's notice of appeal did not expressly reference the denial of the ex parte application. However, nonappealable interim orders are reviewable on appeal from the final judgment. (§ 906.)

SLAPP motion. (*Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, 617; *Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1124.) Section 425.16, subdivision (g)'s discovery stay reflects the "statutory purpose to prevent and deter SLAPP suits by ending them early and without great cost to the SLAPP target." (*Britts v. Superior Court,* at p. 1124.) The trial court may, however, "allow discovery limited to the issues raised by the motion to strike upon 'a timely and proper showing in response to the motion to strike.' [Citation.] The 'proper showing' includes 'good cause' for the requested discovery. (§ 425.16, subd. (g).)" (*Tutor-Saliba Corp.*, at p. 617.) We review the trial court's decision as to whether a plaintiff has complied with the requirements of section 425.16, subdivision (g) for abuse of discretion. (*Tutor-Saliba Corp.*, at p. 617; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1247 (*Tuchscher*); *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 922.) We do not disturb the trial court's decision unless it is arbitrary, capricious, or patently absurd. (*Tuchscher*, at p. 1247.)

We cannot say the trial court abused its discretion here. The anti-SLAPP motion was filed in early February 2014. On May 21, 2014, Lund successfully moved for a continuance of the hearing until July 8, 2014. Despite the looming anti-SLAPP hearing date, Lund did not expeditiously seek to informally resolve the discovery issues and did not bring the ex parte motion until June 12. It was within the trial court's discretion to determine whether, under the circumstances, the motion was timely. Given the timing of the ex parte application the trial court's decision was not arbitrary or capricious. "[T]he statute requires *both* a timely motion and a showing of good cause.

Absent either, the request must fail." (*Tuchscher, supra,* 106 Cal.App.4th at p. 1248; *Tutor-Saliba Corp. v. Herrera, supra,* 136 Cal.App.4th at p. 618 [plaintiff's "last minute attempt to argue that discovery was needed to 'explore' the factual basis for [defendant's] privilege claim was much too little, and came much too late"].)

5. *The motion for attorney fees*

a. *Additional factual background*

After the trial court granted the special motion to strike, Gifford moved for attorney fees of $73,780 pursuant to section 425.16, subdivision (c). His motion was supported by the declarations of Sheppard, Mullin, Richter & Hampton LLP partner Brian M. Daucher and associate Adrienne W. Lee. Daucher stated he had personal knowledge of his firm's billing practices, which he described, and his time on the anti-SLAPP motion was billed in accordance with the firm's regular practice. Attached to his declaration were copies of invoices that accurately reflected the time he spent working on the anti-SLAPP motion. His billing rate was $590 per hour. The declaration summarized Daucher's educational background and his 20 years of legal experience with Sheppard Mullin. Daucher stated that his and Lee's hourly rates were reasonable, based on his personal knowledge of rates in Orange County.

Associate Lee's declaration described the work she did on the motion and her methodology in calculating the amount of fees related to it. Her hourly rate was $440 per hour in 2013 and $500 per hour in 2014. She had redacted and omitted from the request any fees that were unrelated to the anti-SLAPP motion. She anticipated spending an additional 5.5 hours on the fees motion. Lee also prepared a chart setting forth how many hours

were spent on various tasks. The $73,780 was calculated by multiplying the number of hours (135.5) by the billing rate of each timekeeper.

Both declarations were signed under penalty of perjury.

In opposition, Lund argued that the fee request was excessive and unsupported by admissible evidence. He offered the declaration of an expert, Andre Jardini, who had reviewed the bills in question and concluded the requested hourly rates were excessive and the number of hours billed was unreasonable. Jardini also averred that certain billing entries included tasks that were noncompensable "overhead" activities. Jardini's opinion as to the hourly rates was based primarily upon a 2013 "ALM Survey of Law Firm Economics," which was attached to his declaration. In his opinion, only 75.70 hours were compensable and the hourly rates should be reduced to between $299 and $375. Therefore, a fee award of between $22,634.30 and $28,387.50 was warranted.

Lund also filed evidentiary objections. As relevant here, Lund objected that Daucher's statement that his and Lee's hourly rates were reasonable was inadmissible for lack of foundation. (Evid. Code, § 702, subd. (a) [testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge].) The trial court overruled this objection.

The trial court granted Gifford's motion in part, awarding attorney fees of $66,627.[15] It rejected Jardini's opinion and concluded the hourly rates claimed by Daucher and Lee were reasonable. The court stated: "The court finds the expert's

---

[15] The trial court also awarded costs. That ruling is not at issue here.

opinion unpersuasive. The Court is aware from its own experience and its own informal surveys of Los Angeles firms, that the billing rates for fifth year associates in comparable Los Angeles-area firms of comparable size are between $390/hour and $600/hour." The court also found the "nature and difficulty" of the anti-SLAPP motion weighed in favor of a "larger award of attorney[] fees." It observed that the attorneys had not duplicated efforts between the Gifford and Wilson matters, but had either apportioned or split the work between the two cases, and the fees requested in both matters reflected the actual time spent.

The court acknowledged that fees related to discovery initiated by the plaintiff may be compensable, but found the fees incurred in regard to the discovery dispute here should not be awarded because Gifford had not sufficiently shown the dispute was related to the anti-SLAPP motion. The court therefore reduced the requested amount by $7,153.

b. *Discussion*

Lund argues that the trial court's fee award was an abuse of discretion, and requests that we "reverse or reduce" it. He contends that the hourly rates allowed were excessive and the number of hours was unreasonable.

A defendant who brings a successful anti-SLAPP motion under section 425.16 is entitled to mandatory attorney fees. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131; *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 556 (*Premier Medical*).) The fee shifting provision was intended to discourage SLAPP suits. (*Ketchum v. Moses,* at p. 1131.) A defendant may recover fees only for the anti-SLAPP motion, not for the entire litigation.

(*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320 (*Christian Research*).)

We review the amount of attorney fees awarded for abuse of discretion, and the award will not be set aside absent a showing it is manifestly excessive under the circumstances. (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 487; *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 784; *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375.) The " ' " experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong." ' " (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1132; *Premier Medical, supra,* 163 Cal.App.4th at pp. 556-557.)

"The amount of an attorney fee award under the anti-SLAPP statute is computed by the trial court in accordance with the familiar 'lodestar' method. [Citation.] Under that method, the court 'tabulates the attorney fee touchstone, or lodestar, by multiplying the number of hours reasonably expended by the reasonable hourly rate prevailing in the community for similar work.' " (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 491; *Christian Research, supra,* 165 Cal.App.4th at p. 1321.)[16] The fee award should ordinarily include compensation for all hours reasonably spent on the anti-SLAPP and fees motions.

---

16 The lodestar, or basic fee for comparable legal services, may be increased by the trial court based on a variety of factors such as the novelty and difficulty of the issues or the contingent nature of the award. (*Premier Medical, supra,* 163 Cal.App.4th at p. 558.) Gifford did not seek, and the trial court did not use, such a multiplier here.

(*Christian Research,* at p. 1321; *Ketchum v. Moses, supra,* 24 Cal.4th at p. 1133; *Premier Medical, supra,* 163 Cal.App.4th at p. 556.) The prevailing defendant has the burden of establishing his or her entitlement to fees, including the reasonable amount of those fees, by documenting the hours expended and hourly rates. (*Lunada Biomedical v. Nunez, supra,* 230 Cal.App.4th at p. 486; *Christian Research,* at p. 1320.)

We discern no abuse of discretion. The trial court properly employed the lodestar method. Gifford presented billing statements and declarations of the partner and associate who handled the motion. These declarations established the hours worked and the attorneys' billing rates. It is settled that a defendant "can carry its burden of establishing its entitlement to attorney fees by submitting a declaration from counsel instead of billing records or invoices." (*Lunada Biomedical v. Nunez, supra,* 230 Cal.App.4th at pp. 487-488; *City of Colton v. Singletary, supra,* 206 Cal.App.4th at pp. 785-786.) Here Gifford submitted both. " '[T]he verified time statements of [an] attorney[], as [an] officer[] of the court, are entitled to credence in the absence of a clear indication the records are erroneous . . . .' [Citation.]" (*City of Colton,* at p. 785.) The fee detail portion of the bills described the services provided in sufficient detail, and indicated by timekeeper number whether Lee or Daucher performed the tasks. (See *ibid.*) The "reasonable worth of that work can be evaluated by looking at the record. There is nothing that stands out in the declaration as being erroneous." (*Ibid.*) The trial court was familiar with the issues, having reviewed and ruled upon the anti-SLAPP motion. (See generally *Christian Research, supra,* 165 Cal.App.4th at p. 1324; *Premier Medical, supra,* 163 Cal.App.4th at p. 561.) Lee was careful to eliminate from the

request time billed for issues not directly related to the anti-SLAPP motion. The trial court's conclusion that the issues involved were complex was accurate. We would be hard pressed to say the matter was overstaffed, given that only one partner and one associate worked on the motion. The trial court omitted from the award fees related to the discovery dispute, confirming that the court gave careful consideration to the issues and did not simply "rubber stamp" the request.

Lund makes several arguments in support of his position. First, he contends that respondent failed to establish Daucher's and Lee's hourly rates were reasonable, that is, were the rates prevailing in the community for similar work. Lund faults the trial court for overruling his objection to the following portion of Daucher's declaration: "I have personal knowledge of the range of rates generally charged by lawyers in the Southern California area practicing at national firms. My hourly rate and the hourly rate of the associate who worked on this case are reasonable, and reflect rates at or below the prevailing market rates charged in 2014 for similar qualified and experienced professionals at large firms in Orange County, California." Lund complains that Daucher's statement lacked foundation, as there was no explanation as to the basis for Daucher's knowledge and no salary surveys or similar materials were attached to the declaration. Without elaboration, Lund also contends that a portion of Daucher's statement was hearsay. Lund urges that absent Daucher's statement, there was no evidence the hourly rates requested were reasonable. In a related vein, he argues that the trial court impermissibly substituted its own experience and "informal surveys" of Los Angeles law firms to find the rates reasonable, instead of accepting Jardini's conclusions.

Daucher's declaration established that he graduated from Duke University School of Law in 1994 and had worked for Sheppard Mullin since that time. He became a litigation partner in 2003 and an equity partner in 2008. He had tried seven significant cases to verdict and handled over seven anti-SLAPP matters. In overruling Lund's objection, presumably the trial court concluded that a lawyer with Daucher's experience was, by virtue of his years of practice, familiar with the rates typically charged by partners and associates in Southern California. We do not believe this was an unreasonable inference, and Lund cites no authority for the proposition that salary surveys or more detailed foundational facts were required.

But assuming for the sake of argument that Daucher's statement was objectionable, it does not follow that the fee award was unsupported by the evidence. The declarations provided competent evidence of the attorneys' actual hourly rates. The trial court was entitled to rely on its own experience to determine whether those rates were reasonable. "In determining hourly rates, the court must look to the 'prevailing market rates in the relevant community.' [Citation.] . . . In making its calculation, the court should also consider the experience, skill, and reputation of the attorney requesting fees. [Citation.] *The court may rely on its own knowledge and familiarity with the legal market in setting a reasonable hourly rate*. [Citation.]" (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1009, italics added [attorney fees in Fair Debt Collection Practices case].) " 'It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court. . . . [Citations.] The value of legal services performed in a case is a matter in which the trial court

has its own expertise. [Citation.] The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. [Citations.]' " (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096; *Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623-624.) "Trial judges are entrusted with this discretionary determination because they are in the best position to assess the value of the professional services rendered in their courts." (*Christian Research, supra,* 165 Cal.App.4th at p. 1321.)

As to the contention that the trial court abused its discretion when it rejected Jardini's opinion, we disagree. The trial court is charged with making factual determinations when the evidence conflicts, and we may not reweigh its credibility determinations. (*Christian Research, supra,* 165 Cal.App.4th at pp. 1319, 1323.)

Lund further argues that the attorneys' use of "block billing" made it impossible for the trial court to determine whether the hours incurred were reasonable. Block billing occurs when an attorney assigns a block of time to multiple tasks rather than itemizing the hours spent on each task. (*Heritage Pacific Financial, LLC v. Monroy, supra,* 215 Cal.App.4th at p. 1010; *Mountjoy v. Bank of America, N.A.* (2016) 245 Cal.App.4th 266, 279.) Block billing is not objectionable per se. (*Christian Research, supra,* 165 Cal.App.4th at p. 1325; *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 830.) Block billing is problematic when the entries are so vague and general that the court cannot determine which tasks are compensable and which are not. (*Heritage Pacific Financial,* at pp. 1010-1011; *Christian Research,* at p. 1325.) Instead, what is required are records that enable the court to consider "whether the case was overstaffed,

how much time the attorneys spent on particular claims, and whether the hours were reasonably expended." (*Christian Research,* at p. 1320; *Lunada Biomedical v. Nunez, supra,* 230 Cal.App.4th at pp. 486-487.)

The bills submitted here were sufficient to allow the trial court to make these determinations. (See *Lunada Biomedical v. Nunez, supra,* 230 Cal.App.4th at p. 487.) Some of the billing entries pertain to a single task (e.g., "[a]nalyzed issues regarding transcripts of AZ Republic interviews"). Others pertained to related matters that were likely intertwined (e.g., "[r]evised anti-SLAPP motion; research re privilege issues in connection with anti-SLAPP merits section"].) A few entries pertained to discrete tasks related to the motion (e.g., "Reviewed complaint. Telephone conference with Andy Gifford. Conferred with counsel for Gelblum regarding related cases. Analyzed issues regarding transcript of reporters call. Analyzed legal theories."].) But none of the entries are the sort of vague, problematic "block billings" suggested by Lund. It is clear from the content of the entries that all the work done pertained to the anti-SLAPP motion. Each entry's description of the tasks performed was sufficient to allow the trial court to determine whether the time spent was reasonable. The entries do not resemble those found impermissibly vague in other cases. (See, e.g., *Christian Research, supra,* 165 Cal.App.4th at p. 1325 [entries for " 'further handling' " or "anti-SLAPP work"].) The trial court's ruling on the fees motion was not an abuse of discretion.[17]

---

[17] Lund requests that we consider his request for attorney fees related to opposing the anti-SLAPP and fees motions. In light of our conclusions, Lund's request is moot.

DISPOSITION

The trial court's orders are affirmed. Costs are awarded to respondent Gifford.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.